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Suruhanjaya Sekuriti v Lim Chiew

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT D2–22–1776 OF 2005
AZIZAH NAWAWI J
12 JULY 2018

C *Securities — Shares — Trade — Insider trading — Acquisition and disposal of shares — Whether insider trading established — Whether defendant could be considered as insider within statutory meaning — Whether claimant entitled to relief sought against defendant — Securities Industries Act 1983 ss 89E, 90A(5) & (6)*

D

The defendant was an independent non-executive director and a member of the Audit Committe of Magnum Corp Bhd ('Magnum'). In or around July 1999, Multi-Purpose Holdings Bhd ('MP'), the shareholder of Magnum at the material time, entered into negotiations with Bolton Bhd ('Bolton') to sells its entire 30.3% equity interest in Magnum to Bolton ('the Magnum acqusition'). A meeting was convened among representatives of MP to discuss on the Magnum acquisition. Between 2.30–2.45pm, JC Securities Sdn Bhd ('JBS') purchased 590,000 shares in Bolton ('the Bolton shares'). Between 2.45–3.45pm, MP, Bolton and Magnum made their respective announcements to Bursa Malaysia Securities Bhd ('Bursa') that MP had commenced negotiations with Bolton for the proposed disposal of MP entire shareholding in Magnum to Bolton. They also requested for the suspension of the trading of their shares. At about 3.47pm, the suspension took effect and was only lifted on 16 July 1999, which was four days later. When the suspension was lifted, the Bolton shares was disposed of by JBS. The plaintiff sued the defendant for insider trading under the Securities Industries Act 1983 ('the SIA') in relation to the acquisition and disposal of the Bolton shares. The issues that arose for adjudication were: (a) whether defendant could be considered as insider within the meaning of s 89E of the SIA; and (b) whether the plaintiff was entitled to the relief sought against the defendant pursuant to ss 90A(5) and (6) of the SIA.

Held, allowing the claim:

I (1) The plaintiff had proven its case, on the balance of probability against the defendant, that: (a) there was insider trading of Bolton shares during the material period; (b) the account used to trade in the Bolton shares, with inside information, which is in breach of the securities law; (c) the defendant had given instruction to PW1 to buy and sell the Bolton shares

using an IDA 28 account; and (d) the defendant had inside information on the sensitive events, which was the proposed sale of Magnum shares to Bolton from MP, resulting in him giving instruction to buy and sell the Bolton shares (see para 44).

(2) The defendant had contravened s 89E(2) of the SIA. Therefore, the plaintiff was entitled to the statutory relief under s 90A(5) and (6) which was the sum of RM1,242,061.08, being an amount equal to three times the amount of profit that the defendant have gained from the disposal of the Bolton shares. Civil penalties of RM50,000 were also allowed (see para 47).

[Bahasa Malaysia summary

Defendan adalah pengarah bebas bukan eksekutif dan ahli Jawatankuasa Audit Magnum Corp Bhd ('Magnum'). Pada atau sekitar Julai 1999, Multi-Purpose Holdings Bhd ('MP'), pemegang saham Magnum ketika, memasuki rundingan dengan Bolton Bhd ('Bolton') untuk menjual keseluruhan 30.3% kepentingan ekuiti di Magnum kepada Bolton ('pengambilalihan Magnum'). Mesyuarat diadakan antara wakil-wakil MP untuk membincangkan pengambilalihan Magnum. Antara jam 2.30–2.45 petang, JB Securities Sdn Bhd ('JBS') membeli 590,000 saham dalam Bolton ('saham Bolton'). Antara 2.45–3.45 petang, MP, Bolton dan Magnum masing-masing membuat pengumuman kepada Bursa Malaysia Securities Bhd ('Bursa') bahawa MP telah memulakan rundingan dengan Bolton bagi cadangan pelupusan keseluruhan pemegangan saham MP dalam Magnum kepada Bolton. Mereka juga memohon penangguhan perdagangan saham mereka. Pada kira-kira pukul 3.47 petang, penangguhan berkuat kuasa dan hanya ditarik balik pada 16 Julai 1999, iaitu empat hari kemudian. Apabila penangguhan ditarik balik, saham Bolton dilupuskan oleh JBS. Plaintif menyaman defendan bagi dagangan orang dalam di bawah Akta Industri Sekuriti 1983 ('SIA') berhubung dengan pengambilalihan dan pelupusan saham Bolton. Isu-isu yang timbul untuk adjudikasi adalah: (a) sama ada defendan boleh dianggap sebagai orang dalam pengertian s 89E SIA; dan (b) sama ada plaintif berhak mendapat relief yang dipohon terhadap defendan di bawah ss 90A(5) dan (6) SIA.

Diputuskan, membenarkan tuntutan:

(1) Plaintif telah membuktikan kesnya, tentang imbangan kebarangkalian terhadap defendan, bahawa: (a) terdapat perdagangan saham Bolton oleh orang dalam semasa tempoh material; (b) akaun yang digunakan untuk berdagang dalam saham Bolton, dengan maklumat dalaman, melanggar undang-undang sekuriti; (c) defendan telah memberi arahan kepada PW1 untuk membeli dan menjual saham Bolton menggunakan akaun IDA 28; dan (d) defendan mempunyai maklumat dalaman tentang hal keadaan sensitif, yang merupakan cadangan jualan saham Magnum

kepada Bolton oleh MP, hingga memberi arahan untuk membeli dan menjual saham Bolton (lihat perenggan 44).

(2) Defendan melanggar s 89E(2) SIA. Oleh itu, plaintif berhak mendapat relif statutori bawah s 90A(5) dan (6) yang berjumlah RM1,242,061.08, yang merupakan tiga kali ganda jumlah keuntungan yang telah diperoleh oleh defendan hasil pelupusan saham Bolton. Penalti sivil sebanyak RM50,000 juga dibenarkan (lihat perenggan 47).]

Notes

For cases on shares in general, see 11(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 979–1022.

Cases referred to

PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd [2009] 7 MLJ 681, HC (refd)
PP v Chua Seng Huat [1999] 3 MLJ 305, HC (refd)
PP v Low Thiam Hock (2004) (refd)
PP v Wong Chee Keong & Bun Lit Chun (2009) (refd)

Legislation referred to

Securities Commission Act 1993 ss 3, 134, 134(4), 150B
Securities Industries Act 1983 (repealed by Capital Markets and Services Act 2007) ss 89E, 89E(1), (2), 90, 90(2), 90A, 90A(5), (6)

SM Shanmugam (CK Lung and Annarina Chacko with him) (Lee Hishammuddin Allen & Gledhill) for the plaintiff.
RK Sharma (Amrit Pal Singh with him) (Amrit & Co) for the defendant.

Azizah Nawawi J:

INTRODUCTION

[1] The plaintiff's claim against the defendant is for contravention of statutory provisions, that the defendant was an 'insider' within the meaning of s 89E(1) of the Securities Industries Act 1983 ('the SIA 1983') and that he had breached s 89E(2) of the SIA by virtue of his acquisition and disposal of the Bolton shares.

[2] Therefore, the plaintiff is seeking the following reliefs against the defendant pursuant to s 90A(5) and s 90A(6) of the SIA:

(a) RM1,242,061.08 being three times the profit (of RM414,020.36) from the defendant; and

(b) civil penalty not exceeding RM50,000.

THE SALIENT FACTS

[3] The plaintiff is the Securities Commission Malaysia, a body corporate established under s 3 of the Securities Commission Act 1993 ('the SCA 1993') and entrusted with, inter alia, the function to regulate all matters relating to the capital market.

[4] The defendant was an independent non-executive director and a member of the Audit Committee of Magnum Corp Bhd ('Magnum').

[5] At the material time, Multi-Purpose Holdings Bhd ('Multi-Purpose') was a shareholder of Magnum, holding a 30.3% stake in Magnum.

[6] In or around July 1999, Multi-Purpose entered into negotiations with Bolton Bhd ('Bolton') to sell its entire 30.3% equity interest in Magnum to Bolton ('the Magnum acquisition').

[7] On 12 July 1999, the following sequence of events happened:

(a) about 11am, a meeting was convened at Menara Multi-Purpose amongst representatives of Multi-Purpose to discuss on the Magnum acquisition for the first time;

(b) between 2.30–2.45pm, JB Securities Sdn Bhd ('JB Securities') purchased 590,000 shares in Bolton ('the Bolton Shares') via an intra-day trading account IDA 28;

(c) between 2.45–3.45pm, Multi-Purpose, Bolton and Magnum made their respective announcements to Bursa Malaysia Securities Bhd (then known as the Kuala Lumpur Stock Exchange) ('Bursa') that Multi-Purpose had commenced negotiations with Bolton for the proposed disposal of Multi-Purpose entire shareholding in Magnum to Bolton. They also request Bursa for the suspension of the trading of their shares;

(d) at about 3.47pm, the suspension took effect and the suspension was only lifted on 16 July 1999 (about four days later); and

(e) when the suspension was lifted, the 590,000 shares in Bolton was disposed of by JB Securities.

[8] The plaintiff sued the defendant for insider trading under the SIA 1983 in relation to the acquisition and disposal of the Bolton shares.

THE AGREED ISSUES

[9] The parties have agreed that the issues for trial are:

(i) whether the defendant can be considered as an insider within the meaning of s 89E(1) of the Securities Industry Act 1983 on the defendant's acquisition or disposal of the Bolton shares as defined in the statement of claim reviewed against his defences at paras 9 and 10 of the defence; and

(ii) whether the plaintiff is entitled to the relief sought against the defendant pursuant to s 90A(5) and 90A(6) of the SIA.

THE STATEMENT OF AGREED FACTS

[10] The parties have agreed to the following facts:

(a) from 13 April 1999–17 May 2000, the defendant was a director of Magnum Corp Bhd, an associate of Multi-Purpose Holdings Bhd;

(b) at the material time, MPHB was a shareholder of Magnum holding a 30.3% stake in Magnum;

(c) the defendant was an independent non-executive and a member of the Audit Committee of Magnum;

(d) following an application made by the defendant on 30 November 1998, JB Securities Sdn Bhd opened a trading account in the name of the defendant designated as Account No 3LIE85;

(e) the dealer's representative assigned to Account No 3LIE85 was Wan Malek Shahril bin Wan Omar. The dealer code for the said dealer's representative was C28;

(f) the said dealer's representative was allowed the use of an intra-day account designated as account No IDA 28;

(g) on 12 July 1999. the trading of shares in Magnum, MPHB and Bolton Bhd was suspended by Bursa; and

(h) on 12 July 1999, MPHB, Bolton and Magnum made their respective announcements to Bursa Malaysia Securities Bhd (then known as the Kuala Lumpur Stock Exchange) ('Bursa') that MPHB had commenced negotiations with Bolton for the proposed disposal of MPHB's entire shareholding in Magnum to Bolton.

THE FINDINGS OF THE COURT

Issue (i): Whether the defendant can be considered as an insider within the meaning of s 89E(1) of the Securities Industry Act 1983 on the defendant's acquisition or disposal of the Bolton shares as defined in the statement of claim reviewed against his defences at paras 9 and 10 of the defence

[11] The first issue is on the admissibility of ID 87. ID 87 is a written statement given by the deceased, Wan Malek Shahril bin Wan Omar pursuant to s 134(4) of the SCA 1993 to the investigating officer of the plaintiff. The plaintiff is seeking to admit the statement of the deceased, Wan Malek Shahril bin Wan Omar, ID 87 under s 150B of the SCA 1993, which reads as follows:

> 150B Admissibility of statements and documents of persons who are dead or cannot be traced.
>
> Notwithstanding any written law to the contrary, in any proceedings against any person for an offence under the security laws —
>
> (a) *Any statement made by any person to an Investigating Officer of the Commission in the course of an investigation under the securities laws;* and
>
> (b) Any document, or copy of any document, seized from any person by an Investigating Officer of the Commission in the exercise of his powers under and by virtue of the securities laws,
>
> *shall be admissible in evidence in any proceedings before any court, where the person who made the statement* or document or the copy of the document, or the person from whom the document was seized, *is dead,* or cannot be traced or found, or has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which appears to the court unreasonable. (Emphasis added.)

[12] It is not in dispute that the late Wan Malek Shahril bin Wan Omar has made a statement to the investigating officer under s 134 of the SCA 1993 and the said statement is marked as ID 87.

[13] However, from a plain reading of s 150B, the said statement of the deceased Wan Malek Shahril bin Wan Omar can only be used in 'any proceedings against any person for an *offence* under the securities law'. The word 'offence' is defined in LB Curzon *A Dictionary of Law* as 'Generally, that which is *equivalent to a crime, ie, an act or omission punishable under criminal law'.*

[14] Therefore, the deceased statement can only be used in a criminal proceeding, where a person has been charged for a criminal offence under the securities law. It cannot be used in a civil trial, as in the present case. This is supported by s 90 of the SIA 1983, which makes a distinction between civil remedies and criminal prosecution, in that the Commission may still proceed with civil remedies where a person has contravened, amongst others, s 89E of the SIA 1983, even if there were no criminal charges preferred or that the criminal charge has not been proven.

[15] As such, I am of the considered opinion that the plaintiff cannot rely on s 150B of the SCA 1993 to admit the statement of the late Wan Malek Shahril

bin Wan Omar as evidence against the defendant. ID 87 is therefore inadmissible.

[16] On the merits of the plaintiff's case, s 90 of the SIA 1983 allows the plaintiff to proceed with civil remedies where any person has contravened specific provisions of the SIA 1983, and s 90 reads:

> 90 Civil remedies.
>
> (1) Where it appears to the Commission that any person has contravened section 84, 85, 86, 87, 87A, 88 or 89E, the Commission may institute civil proceedings in the Court against that person, whether or not that person has been charged with an offence in respect of the contravention, or whether or not a contravention has been proven in a prosecution.
>
> (2) A proceeding under subsection (1) or under section 88A or 90A may be begun at any time within twelve years from —
>
> (a) the date on which the cause of action accrued; or
>
> (b) the date on which the Commission or the plaintiff, as the case may be, discovered the contravention,
>
> whichever is the later.

[17] In view of s 90 above, there is no merit in the defendant's contention that there is inordinate delay in the filing of this suit, which was only filed more than six years after the event. Since, sub-s 90(2) of the SIA 1983 allows the suit to be filed within 12 years, the plaintiff's suit is filed within the statutory period.

[18] The plaintiff's claim against the defendant is premised on insider trading under sub-s 89E(1) and breaching s 89E(2) of the SIA 1983, which reads:

> 89E Prohibited conduct of person in possession of inside information.
>
> (1) A person is an 'insider' if that person —
>
> (a) possess information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or value of securities; and
>
> (b) knows or ought reasonably to know that the information is not generally available.
>
> (2) An insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates —
>
> (a) acquire or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of such securities; or
>
> (b) procure, directly or indirectly, an acquisition or disposal of, or

entering into an agreement for or with a view to the acquisition or disposal of such securities.

[19] Therefore, under sub-ss 89E(1) and (2), the onus is on the plaintiff to establish on the balance of probability that the defendant is an insider in respect of the Bolton shares, and that as an insider, the defendant cannot acquire or dispose the said Bolton shares.

[20] Since the plaintiff's claim is premised on the trading of the Bolton shares, the first issue here is whether there is any insider trading of the Bolton shares during the material period of 8 July–16 September 1999.

[21] The plaintiff's expert witness, Dr Neoh Soon Kean ('PW9') gave evidence on his analysis of the trading of the Bolton shares during the period 1 June–31 September 1999 in his report marked as exh P79. PW 9 is the founder and Executive Chairman of Dynaquest Sdn Bhd, which is an investment research, consulting and publication firm. PW9 is currently a member of the Malaysian Rating Corporation. Added to that, he was a lecturer in the University Sains Malaysia (1977–1992), as a member of the Kuala Lumpur Stock Exchange Committee (1988–1990), as the deputy chairman of the advisory board of the Malaysian Central Depository (1995–2000) and a member panel of the Malaysian Accounting Standards Board (1997–2003).

[22] Apart from writing several academic articles that have been published in academic journals, PW9 had also written a book, Stock Market Investment in Malaysia and Singapore, which was sold more than 50,000 copies. Added to that, he has given evidence in three criminal cases (*Public Prosecutor v Chua Seng Huat* [1999] 3 MLJ 305, *Public Prosecutor v Low Thiam Hock* (2004) and *Public Prosecutor v Wong Chee Keong & Bun Lit Chun* (2009)) where his evidence had been accepted by the courts. In view of his credentials and expertise, I find PW9 to be a credible expert witness on the subject matter.

[23] PW9 explained that he was instructed by the plaintiff to look into the following matters:

(a) to analyse whether there was a possible breach of insider trading in the Bolton shares during the period from 1 June–30 September 1999; and

(b) if there was a possible breach, whether it was from by a specific account, CDS account No 078-001-024166944 ('the CDS account').

[24] From his report and his evidence, on *issue (i)*, that is whether there was a possible breach of insider trading in the Bolton shares during the period from 1 June–30 September 1999, PW9 made the following findings in Q/A6 of his witness statement ('WSPW9'):

I was given the trading data for Bolton shares from the Kuala Lumpur Stock Exchange for the period 1.6.1999 to 30.9.1999 (ie Investigation Period) to analyse.

...

For the purpose of my analysis, I divided this section of the Investigation Period into two sub-periods — the 1st Sub-Period (1.6.1999 to 7.7.1999) and the 2nd Sub-Period (8.7.1999 to 16.7.1999)

I found that during the 1st Sub-Period, the price change in Bolton Shares (+0.66%) was small compared to the Composite Index (+10.55%) and the Property Index (+23. 7%).

However, during the 2nd Sub-Period, I found amongst others, that —

(a) The change in price of Bolton Shares was dramatic — an increase of 51.32% in just 4 days trading.

(b) There were only 4 trading days for the 2nd Sub-Period because the trading in Bolton Shares was suspended for 3 days from 13.9.1999 to 15.7.1999.

(c) The strongest upward move in the price of Bolton Shares occurred on 12.7.1999 when it spiked upwards by 28.22%. the trading in Bolton Shares was also suspended on the same day from 3.47 p.m onwards.

(d) The second strongest upward move in the price of the Bolton Shares occurred on 16.7.1999 when the suspension was lifted- there was upward spike of 10.05%.

(e) In comparison, neither did the Composite Index nor the Property Index reflect such a sharp rise during this 2nd Sub-Period.

From my analysis, at this point I concluded, amongst others, that —

(a) Some major events and/or news break must have taken place during the 2nd Sub-Period, in particular between 12.7.1999 and 16.7.1999 — to lead to such a large abnormal price movement.

(b) Whatever the events and/or news were, it would not be much related to the stock market as a whole (ie Composite Index) or the property sector (ie Property Index) as a whole since these two were much less affected.

[25] In Q/A 8, PW9 gave the following evidence:

I then ventured into exploring what were the likely events and/or news which could have led to such abnormal increase in the price of Bolton Shares during the 2nd Sub-Period. This is contained in the 4th Section of my report.

I carefully examined all the relevant newspaper articles provided by the Securities Commission (summarized in Exhibit 1 of my report) as well as all the relevant announcements by and communications with KLSE (summarized in Exhibit 2 of my report).

I concluded, amongst others, that —

(a) The newspaper articles such as 'Bolton, MD to buy MPHB's Magnum Stage' dated 13.7.1999 (Exhibit 1.T) or 'Multi-Purpose Holdings Bhd Has Commenced Negotiations with Tan Sri Lim Yan Hai and Bolton Bhd for the Proposed Disposal of its entire equity in Magnum Corp Bhd' dated 14.7.1999 (Exhibit 1.V) were most likely to have material effect on the price of the Bolton Shares after they have gone public.

(b) Communications between Bolton Berhad, Magnum Corporation Berhad and MPHB with KLSE concerning the proposed take-over of MPHB's stake in Magnum by Bolton made between 12.7.1999 and 15.7.1999 would appear to contain highly price sensitive information.

(c) Hence, the events and/or news described above were highly sensitive, and a person who was in possession of such news before it became known by the public, could have made use of it to obtain abnormal gain in trading Bolton Shares.

[26] With regards to *issue (ii)*, that is, if there was a possible breach of insider trading of the Bolton shares, whether the breach was from by a specific account, CDS Account, PW9 made the following findings in Q/A 9:

I analysed the trading pattern of the CDS Account to establish whether the trading activities of this account would be linked to the unusual behavior of Bolton Shares. The analysis is contained in section 5 of my report.

From the analysis, I found, amongst others, that —

(a) This CDS Account was previously not an established trader in Bolton Shares.

(b) During the whole of the Investigation Period, this CDS Account only traded on 2 days - one day of buying and one day of selling.

(c) This CDS Account purchased 590 lots on 12.7.1999, and then sold the same 590 lots 4 days later on 16.7.1999.

(d) These shares were bought immediately before the trading in Bolton Shares was suspended, and sold immediately after the suspension was lifted.

(e) Thus, its holding of Bolton Shares was an extremely short one-in effect just one single trading day.

(f) This trading behavior was not indicative of the actions of a long term investor.

From the above, I could ascertain the possible motives of this CDS Account (section 6 of my report). In a gist, amongst others, that this CDS Account's trading activities resemble those of an insider trading provided that the person operating this account had access to the sensitive events and/or news as described above. If the person operating this account did have access to those privileged information, then the possibility of coincidence is unlikely.

[27] PW 9 then gave the following summary of his findings in Q/A 10:

A In summary, it can be concluded from the above analysis that there is a case for suspecting that there was an attempt at insider-trading by this CDS Account during the Investigation Period on Bolton Shares. This is predicated on the assumption that the person operating this CDS Account had access to price sensitive information before it became generally known.

B There are broadly 3 reasons why I say so —

(a) Firstly, the price sensitivity of the information on the take-over of MPHB's stake in Magnum Corporation was very obvious and hard to deny.

(b) Secondly, this CDS Account did not trade at all until just before the C announcement and did not trade again once its accumulated Bolton Shares had been fully disposed of immediately after the announcement.

(c) Thirdly, the quantity Bolton Shares bought exactly matched the quantity of Bolton Shares disposed.

D **[28]** Therefore, it is the findings of the expert, PW 9 that the CDS account was involved in the buying and selling of the Bolton shares during the material period. The CDS account is JB Securities proprietary account, IDA 28, as per *exh P67*. The IDA 28 account had purchased 590,000 Bolton shares on 12 July 1999 and sold all the same shares on 16 July 1999. PW9 then concludes that E the IDA 28 trading activities resemble that of an insider trading provided that the person operating this account had access to the sensitive events, namely the proposed takeover of Multi-Purpose Holding's shares in Magnum by Bolton.

F **[29]** Having considered PW 9's evidence, this court will accept his expert evidence and his findings in *exh P79* that:

(a) there was insider trading of Bolton shares during the material period; and

(b) the IDA 28 was used to trade in the Bolton shares, with inside information, which is in breach of the securities law. G

[30] The defendant did not challenge the expertise of PW9 in preparing the report and his findings with regards to the subject matter. Neither did the defendant offer an expert witness to dispute the findings of PW9. At the same H time, it cannot be said the PW9's evidence to be obviously lacking in defensibility. In *PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd* [2009] 7 MLJ 681, with regards to expert evidence, the court held that:

> 73 In other words, the *court may not reject unopposed expert evidence unless the evidence of the expert is 'obviously lacking in defensibility'*. PW3's evidence in the I present case cannot be said to be 'obviously lacking in defensibility'. (Emphasis added.)

[31] The next issue is the nexus between the defendant and the CDS account (IDA 28). It is an agreed fact that the IDA 28 is an intra-day account

belonging to JB Securities. It is also an agreed fact the late Wan Malek Shahril bin Wan Omar was the dealer's representative in charge of this IDA 28. It is also an admitted fact that the late Wan Malek Shahril was also the defendant's dealer for his personal trading account with JB Securities.

[32] The defendant took the position that he was not involved in the buying and selling of the Bolton shares as there were no transactions of the same in his personal trading account, 3LIE85.

[33] However, the evidences of PW1 and PW2 showed otherwise. PW1 was an employee with JB Securities between 1995–2000. I accepted the evidence of PW1, who said that he received instructions from the late Wan Malek Shahril bin Wan Omar to service the proprietary account, IDA 28 by taking instructions from one, Mr Lim. PW1 also confirmed that he received instructions from Mr Lim to purchase 590,000 units of the Bolton shares on 12 July 1999. PW1 also gave evidence that Mr Lim instructed him to sell all the 590,000 of Bolton shares on 16 July 1999. PW1 has confirmed that he had acted on Mr Lim's instruction by purchasing 590,000 units of the Bolton shares on 12 July 1999 and selling the same on 16 July 1999 and this purchase and disposal of the Bolton shares were made via the proprietary account, IDA 28.

[34] The evidence of PW1 is supported by PW2, who was the Finance Manager of JB Securities during the material time. PW2 gave evidence that the IDA 28 is a proprietary account of JB Securities. However, PW2 added that it was the defendant, Mr Lim Chew who had used the JB Securities proprietary account IDA 28 because the bosses allowed it. PW2 testified that there was a sharing arrangement between JB Securities and the defendant, Mr Lim that where there is a profit made in the IDA 28 account, the profits will be shared 50:50 between JB securities and the defendant. Under cross-examination, PW2 gave the following evidence:

> RKS: It doesn't, can you explain whether the Defendant in this matter Mr Lim Chiew has under JB Securities proprietary account or is he an individual account?
>
> YIP: He used the proprietary account.
>
> ...
>
> RKS: I put it to you Ms Yip that based on your answer, Mr Lim Chiew could not have possibly traded on the proprietary account under JB Securities?
>
> YIP: The bosses allowed him:
>
> (see NOP/p 94)

[35] PW2 then gave evidence that the disposal of the Bolton shares earned a profit of RM414,020.36. The said amount is computed with the loss of

RM244,870.65 for the months of April–June 1999. After the deduction, the profit sharing between JB Securities and the defendant is RM162,780.14, with each party to profit RM81,390.10. This sum is subsequent paid to the defendant together with profits from his personal trading account, 3LIE85. The cheque of RM148,162.06 payable to Lim Chiew was cleared and received by the defendant. In fact, the defendant did not dispute receiving and cashing the cheque of RM148,162.06.

[36] Having considered the evidence of the defendant, (*who merely states that there is no dealing of the Bolton shares from his personal trading account and that since the IDA 28 is JB Securities proprietary account which he had no access, then he did not deal with the Bolton shares*) as against the evidences of PW1 and PW2, I am of the considered opinion and I accept the evidence of PW1 and PW2 that the defendant had given instruction to PW1 to buy and to sell 590,000 Bolton shares through IDA 28 and that he had received a profit from this arrangement.

[37] Added to that, the documentary evidence clearly shows that telephone calls from the office on 32nd floor Menara Multi-Purpose occupied by the defendant were made to JB Securities, directly to PW1 who takes the defendant's instruction. There were seven separate transactions between 2.32:14pm–2:39:53pm which correlates with the calls made to PW1, executing the seven buy orders amounting to 590 lots of the Bolton shares.

[38] The next issue is whether the defendant had knowledge of the sensitive events when he gave instruction to trade on the Bolton shares. The sensitive events from PW9's report and evidence is the proposed take-over of Multi-Purpose's stake in Magnum by Bolton.

[39] During the material time, the defendant was an independent non-executive director and a member of the Audit Committee of Magnum. I also accepted the evidence of PW6 that the office on 32nd floor Menara Multi-Purpose was occupied by the defendant from May–Sept 1999. PW6 also confirmed that the office telephone '03-2947498' was used by the defendant between May–September 1999.

[40] At the same time, telephone calls from the office on 32nd floor Menara Multi-Purpose occupied by the defendant were made to JB Securities, directly to PW1 who takes the defendant's instruction. There were seven separate transactions between 2.32:14pm–2:39:53 pm which correlates with the calls made to PW1, executing the seven buy orders amounting to 590 lots of the Bolton shares.

[41] Therefore, from the evidence before me I find that the defendant must have knowledge of the sensitive events, namely the proposed takeover of

Multi-Purpose Holding's shares in Magnum by Bolton. Having such knowledge, he had given directions to buy a large amount of the shares just before the suspension. The orders to buy, from the evidence of PW1 is supported by the timing of the phone calls from the defendant's office to JB Securities. The evidence of the arrangement to use IDA 28 is supported by the payment of profits paid to the defendant.

[42] The defendant gave evidence that he was not privy to the sensitive events, however PW4, the executive director and group legal advisor of Multi-Purpose gave evidence that 'it is most likely that a number of us within the organization and group would have known of this information as we were rushing to take steps such as notifying KLSE to suspend the counters'. This is supported by PW5, the company secretary of Multi-Purpose at that relevant time, who gave the following evidence:

> SSM: Next page Ms Lee. Do you know if Mr Lim Chiew had any knowledge of the Magnum acquisition?
>
> LEE: I do not know. But I cannot discount this possibility because on 12.07.1999 prior to the suspension, it is most likely that a number of us within the organization and group would have known of this information as we were rushing to take steps such as notifying KLSE to suspend the counters. As I stated earlier, I also informed Ms Gan Cheong Ann of this.
>
> (see NOP/p 202)

[43] Further, if the defendant did not have any knowledge of the sensitive event, why did he instructs PW1 to buy a large amount of the Bolton shares, when he had never traded in Bolton shares before.

[44] In the premise, I am of the considered opinion that the plaintiff has proven its case on the balance of probability against the defendant. The plaintiff has proven that:

(a) there was insider trading of Bolton shares during the material period;

(b) the IDA 28 account was used to trade in the Bolton shares, with inside information, which is in breach of the securities law;

(c) the defendant had given instruction to PW1 to buy and sell the Bolton shares using IDA 28 account; and

(d) the defendant had inside information on the sensitive events, that is the proposed sale of Magnum shares to Bolton from Multi-Purpose, resulting in him giving instruction to buy and sell the Bolton shares.

[45] In view of my findings that the plaintiff has proven its case against the

defendant, I do not find it necessary to deal with the issue of the impeachment of the defendant.

Issue (ii): Whether the plaintiff is entitled to the relief sought against the defendant pursuant to s 90A(5) and 90A(6) of the Securities Industry Act 1983

[46] Section 90A is a provision on recovery of loss or damages. Subsection 90A(5) and (6) provides as follows:

> (5) Where an insider acquired or agreed to acquire, or procured another person to acquire or agree to acquire, securities, in contravention of subsection 89E(2), and such securities were permitted to be traded on a stock market of a stock exchange, then, whether or not the insider or any other person involved in the contravention has been charged with an offence in respect of the contravention or whether or not the contravention has been proved in a prosecution, the Commission may, if it considers that it is in the public interest to do so, by civil action against the insider or any other person involved in the contravention —
>
> (a) recover an amount equal to three times the amount being the difference between the price at which the securities were acquired, or agreed to be acquired, by the insider or the other person, and the price at which they would have been likely to have been acquired at the time of the acquisition or agreement, as the case may be, if the information had been generally available; and
>
> (b) claim civil penalty in such amount as the Court considers appropriate having regard to the seriousness of the contravention, being an amount not more than one million ringgit.
>
> (6) Where an insider disposed of or agreed to dispose of, or procured another person to dispose of or agree to dispose of, securities, in contravention of subsection 89E(2), and such securities were permitted to be traded on a stock market of a stock exchange, then, whether or not the insider or any other person involved in the contravention has been charged with an offence in respect of the contravention or whether or not the contravention has been proved in a prosecution, the Commission may, if it considers that it is in the public interest to do so, by civil action against the insider or any other person involved in the contravention —
>
> (a) recover an amount equal to three times the amount being the difference between the price at which the securities were disposed of, or agreed to be disposed of, by the insider or the other person, and the price at which they would have been likely to have been disposed of at the time of the disposal or agreement, as the case may be, if the information had been generally available; and
>
> (b) claim civil penalty in such amount as the Court considers appropriate having regard to the seriousness of the contravention, being an amount not more than one million ringgit.

[47] In view of my findings that the defendant has contravened sub-s 89E(2) of the SIA 1983, then the plaintiff is entitled to the statutory relief under sub-ss 90A(5) and (6), that is the sum of RM1,242,061.08 being an amount equal to three times the amount of profit that the defendant have gain from the disposal of the Bolton shares. Added to that, the civil penalties of RM50,000 is also allowed.

Claim allowed.

Reported by Afiq Mohamad Noor